Chang Yun Tai & Ors v Dataran Mantin Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8–22–1498 OF 2005
KANG HWEE GEE J
28 APRIL 2008

Civil Procedure — Striking out — Application to strike out action — Whether plain and obvious case for striking out plaintiffs' claim against financial institutions — Rules of the High Court 1980 O 18 r 19

Equity — Estoppel — Financing agreements — Allegation that sale and purchase agreement void — Loan already disbursed by banks — Whether banks could be estopped from exercising rights under loan agreement

The 178 plaintiffs in this suit, who are all purchasers of apartments to be built by a developer called Dataran Mantin Sdn Bhd, had obtained end financing from various financial institutions including the 14th, 17th and 18th defendants ('the banks'). The plaintiffs had commenced this suit against the developer and directors of certain companies connected with the developer whom the plaintiffs alleged had conspired to defraud the plaintiffs by way of a scheme aimed at inducing the plaintiffs into purchasing apartments from the developer. In essence, the plaintiffs were seeking, by this action, to declare that the sale and purchase agreements which they had individually entered into with the developer were void by reason that the local authority, the Majilis Perbandaran Nilai ('the seventh defendant') had contravened s 101(r) proviso (i) of the Local Government Act 1976 ('1976 Act') when disposing of the land on which the apartments were developed. As a result of this and other irregularities, the plaintiffs had contended that the primary instrument, that is the sale and purchase agreements were void in law. The plaintiffs therefore contended that since the sale and purchase agreements were void, the end financing agreements secured by a purported assignment of rights under the sale and purchase agreements were also void. The plaintiffs' cause of action against the banks however, was premised not on any impropriety on the part of the banks in granting the loans to the plaintiffs but on the assertion that the banks were expected to know of the alleged irregularities committed by the seventh defendant and the developer and consequently the banks should be estopped from exercising their right under the loan agreements. The banks applied to strike out the plaintiffs' action under O 18 r 19(1)(a) of the Rules of the High Court 1980 on the grounds that there was

no reasonable cause of action. This is an appeal by certain plaintiffs against the decision allowing the application by the banks. The plaintiffs contended that the case was not a plain and obvious one for striking out and that the issues raised in this action could not be determined summarily on the pleadings. The banks maintained that there was nothing illegal about the financing agreements which were only to enable the plaintiffs to purchase service apartments. The banks therefore submitted that it was not sufficient for the plaintiffs to merely identify the issues which ought to be tried but instead the court must be satisfied that there are issues that must be tried. The main issue before this court was whether the decision to allow the banks' joint application to strike out the plaintiffs' case for not disclosing a reasonable cause of action, in so far as it involves the banks, was correct.

Held, dismissing the appeal with costs:

(1) The relationship between the plaintiffs and the banks was purely commercial in nature, in that the monies were lent to be repaid in accordance with the terms and conditions of the loan agreements. The contracts were therefore purely contracts to lend money using the apartments as security for the loan. The banks had nothing to do with the plaintiffs' purchase of the apartments, which was strictly a matter between the developer and the plaintiffs. The banks as the provider of the loans should not be concerned with the propriety or legality of any contracts entered into by the seventh defendant, the developer or any other persons leading to the acquisition and development of the land on which the apartments were built. The fact that the seventh defendant may have contravened the 1976 Act or the Power of Attorney Act 1949 in granting the developer the power to act on its behalf and that there were other irregularities in the sale and purchase of the apartments, which may be proved and accepted by the court at trial, are totally irrelevant in so far as it involves the liability of the banks to the plaintiffs under the loan agreements between them. It was clearly repugnant to common sense to find a cause of action based purely on the assertion that the banks were supposed to know of the irregularities and should be estopped from enforcing their rights under the loan agreements (see paras 27–30).

(2) Another reason why the plaintiffs' action against the banks was unsustainable, was that, since the sale and purchase of the apartments had been completed and the loan sums had been disbursed to the respective plaintiffs to pay for the purchase, the court would not lend its hand in equity to declare that the banks are estopped from exercising

A their rights under the loan agreement as to do so would result in the plaintiffs unjustly benefiting from not having to repay the loan (see para 33).

(3) It would appear that the plaintiffs' action against the banks was purely
B pre-emptive and calculated to forestall any action by the banks to recover the loan from the plaintiffs at least for the period that the question of illegality concerning the development of the apartments remained unresolved. Needless to say that such action was an abuse of the process of the court and as such the court had the inherent
C jurisdiction to strike out the plaintiffs' action against the banks (see para 34).

[Bahasa Malaysia summary

D 178 plaintif-plaintif di dalam guaman ini, yang kesemuanya adalah pembeli-pembeli pangsapuri yang akan dibina oleh pemaju yang dikenali sebagai Dataran Mantin Sdn Bhd, telah memperoleh pinjaman daripada beberapa institusi kewangan termasuk defendan-defendan ke 14, 17 dan 18 ('bank-bank tersebut'). Plaintif-plaintif telah memulakan guaman ini
E terhadap pemaju dan pengarah-pengarah syarikat tertentu yang mempunyai kaitan dengan pemaju yang plaintif-plaintif dakwa telah berkonspirasi untuk memfraud plaintif-plaintif melalui skim yang bertujuan untuk membuat plaintif-plaintif membeli pangsapuri-pangsapuri tersebut daripada pemaju. Khususnya, plaintif-plaintif memohon, melalui tindakan ini, untuk
F mengisytiharkan bahawa perjanjian jual beli yang mereka meterai secara individu dengan pemaju adalah batal atas alasan bahawa pihak berkuasa tempatan, Majlis Perbandaran Nilai (defendan ketujuh) telah melanggar s 101(r) proviso (i) Akta Kerajaan Tempatan 1976 ('Akta 1976') apabila memberikan tanah tersebut atas mana pangsapuri-pangsapuri tersebut
G dibina. Disebabkan oleh perkara ini dan lain-lain pelanggaran, plaintif-plaintif menghujah bahawa instrumen utama, iaitu perjanjian jual beli menjadi tidak sah dari segi undang-undang. Plaintif-plaintif oleh itu menghujah bahawa oleh kerana perjanjian-perjanjian jual beli adalah batal, maka perjanjian-perjanjian pinjaman yang dijamin oleh penyerahan hak yang
H dimaksudkan di bawah perjanjian-perjanjian jual beli tersebut juga adalah batal. Walau bagaimanapun, kausa tindakan plaintif-plaintif terhadap bank-bank tersebut bukan berasaskan apa-apa salah laku pada pihak bank-bank tersebut dalam memberikan pinjaman tersebut kepada plaintif-plaintif tetapi atas alasan bahawa bank-bank adalah dikehendaki
I untuk mengetahui pelanggaran yang dilakukan oleh defendan ketujuh dan pemaju dan oleh yang demikian bank-bank tersebut sepatutnya diestop daripada melaksanakan hak mereka di bawah perjanjian-perjanjian pinjaman tersebut. Bank-bank tersebut memohon untuk membatalkan tindakan plaintif-plaintif di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah Tinggi

1980 atas alasan bahawa tidak terdapat kausa tindakan yang munasabah. Ini adalah rayuan oleh beberapa plaintif terhadap keputusan membenarkan permohonan bank-bank tersebut. Plaintif-plaintif menghujah bahawa ini bukan kes yang jelas dan nyata untuk dibatalkan dan bahawa isu-isu yang dibangkitkan di dalam tindakan ini tidak boleh diputuskan secara terus berdasarkan pliding-pliding. Bank-bank mempertahankan hujahan bahawa tidak ada apa-apa yang melanggar undang-undang dalam perjanjian-perjanjian pinjaman tersebut yang mana adalah hanya untuk membolehkan plaintif-plaintif membeli pangsapuri. Oleh itu, bank-bank tersebut menghujah bahawa ia tidak mencukupi untuk plaintif-plaintif semata-mata mengenal pasti isu-isu yang perlu dibicarakan sebaliknya mahkamah perlu berpuas hati bahawa terdapat isu-isu yang mesti dibicarakan. Isu utama di mahkamah ini adalah sama ada keputusan untuk membenarkan permohonan bersama bank-bank tersebut untuk membatalkan kes plaintif-plaintif kerana tidak mendedahkan kausa tindakan yang munasabah, setakat yang melibatkan bank-bank tersebut, adalah betul.

Diputuskan, menolak rayuan dengan kos:

(1) Hubungan di antara plaintif-plaintif dan bank-bank tersebut adalah semata-mata bersifat komersial, di mana wang yang dipinjamkan perlu dibayar semula menurut terma-terma dan syarat-syarat perjanjian-perjanjian pinjaman. Kontrak-kontrak tersebut, oleh itu, adalah kontrak-kontrak untuk pinjaman wang menggunakan pangsapuri-pangsapuri tersebut sebagai jaminan untuk pinjaman tersebut. Bank-bank tersebut tidak mempunyai kaitan dengan pembelian pangsapuri-pangsapuri tersebut oleh plaintif-plaintif, yang mana adalah perkara di antara pemaju dan plaintif-plaintif. Bank-bank tersebut sebagai pemberi pinjaman tidak perlu menghiraukan tentang kesesuaian atau kesahan sebarang kontrak yang dimasuki oleh defendan ketujuh, pemaju atau orang lain yang membawa kepada pemilikan dan pembangunan tanah tersebut yang di atasnya pangsapuri-pangsapuri tersebut dibina. Fakta bahawa defendan ketujuh mungkin melanggar Akta 1976 atau Akta Surat Kuasa Wakil 1949 dalam memberikan pemaju kuasa untuk bertindak bagi pihaknya dan bahawa terdapat tidak aturan lain di dalam jual beli pangsapuri-pangsapuri tersebut yang boleh dibuktikan dan diterima oleh mahkamah dalam perbicaraan, adalah tidak relevan sama sekali setakat yang melibatkan liabiliti bank-bank tersebut kepada plaintif-plaintif di bawah perjanjian-perjanjian pinjaman di antara mereka. Adalah jelas bertentangan dengan kebijaksanaan untuk mencari kausa tindakan berdasarkan, semata-mata atas penegasan bahawa bank-bank tersebut sepatutnya mengetahui tidak aturan tersebut dan sepatutnya diestop

daripada melaksanakan hak mereka di bawah perjanjian-perjanjian pinjaman tersebut (lihat perenggan 27–30).

(2) Alasan lain mengapa tindakan plaintif-plaintif terhadap bank-bank tersebut tidak boleh dikekalkan, adalah bahawa, oleh kerana jual beli pangsapuri-pangsapuri tersebut telah diselesaikan dan jumlah pinjaman telah dibayar kepada plaintif-plaintif tersebut untuk membayar pembelian tersebut, mahkamah tidak akan campur tangan dalam ekuiti untuk mengisytiharkan bahawa bank-bank tersebut adalah diestop daripada melaksanakan hak-hak mereka di bawah perjanjian pinjaman kerana untuk berbuat demikian akan menyebabkan plaintif-plaintif mendapat faedah secara tidak adil dengan tidak perlu membayar semula pinjaman (lihat perenggan 33).

(3) Ia jelas bahawa tindakan plaintif-plaintif terhadap bank-bank tersebut adalah semata-mata sebagai membantutkan dan merupakan untuk mendahului sebarang tindakan oleh bank-bank tersebut untuk mendapatkan semula pinjaman daripada plaintif-plaintif, sekurang-kurangnya bagi tempoh di mana persoalan ketidaksahan berkaitan dengan pembangunan pangsapuri-pangsapuri tersebut masih tidak diselesaikan. Tidak dipertikaikan bahawa tindakan sedemikian adalah penyalahgunaan proses mahkamah dan oleh itu mahkamah mempunyai bidang kuasa sedia ada untuk membatalkan tindakan plaintif-plaintif terhadap bank-bank tersebut (lihat perenggan 34).]

Notes

For cases on application to strike out action, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6696–6702.

For cases on financing agreements under estoppel generally, see 6 *Mallal's Digest* (4th Ed, 20067 Reissue) paras 2693–2713.

Cases referred to

Baranick v Counsel Trust Co unreported, 4 January 1994 (General Division of the Ontario Court) (refd)

Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356 (not folld)

Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313 (refd)

Drummond-Jackson v British Medical Association [1970] 1 All ER 1094 (refd)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd [1996] 2 MLJ 431 (refd)

Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565 (refd)

Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor [1984] 1 CLJ (Rep) 211 (refd)

Lori Malaysia Bhd v Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 (refd)

Republic of Peru v Peruvian Guano Co (1887) 36 Ch D 489 (refd)

Verschures Creameries Ltd v Hull and Netherlands Steamship Co Ltd [1921] All ER Rep 215; [1921] 2 KB 608 (refd) A
Wenlock v Moloney [1965] 2 All ER 871 (refd)

Legislation referred to
Companies Act 1965 s 67, Part 4 Division 5 B
Contracts Act 1950 s 24(b)
Local Government Act 1976 s 101(r) proviso (i)
Housing Developers Act 1966
Power of Attorney Act 1949
Rules of the High Court 1980 O 18 r 19(1), O 18 r 19(1)(a) C

Malik Imtiaz Sarwar (M Lavendran with him) (Ngeow & Tan) for the plaintiff.
Benjamin John Dawson (Koh San Tee with him) (Benjamin Dawson) for the 14th, 17th & 18th defendants.

Kang Hwee Gee J (delivering oral judgment ex tempore): D

[1] This is an appeal by the 30th, 54th, 134th, 160th, 161th, 162th, 164th, 165th, 166th, 167th, 168th, 177th, 178th plaintiffs against the decision of the deputy registrar in allowing the application by the 14th, 17th and 18th defendants to strike out the plaintiffs' action on account that there is no reasonable cause of action pursuant to O 18 r 19(1)(a) of the Rules of the High Court 1980. E

[2] All the 178 plaintiffs were purchasers of apartments to be built by a developer called Dataran Mantin Sdn Bhd and had obtained end financing from various financial institutions including the 14th, 17th and 18th defendants vide the respective loan cum assignment agreements entered into between them and the defendants. F G

[3] The plaintiffs had commenced this suit against the developer, directors of certain companies connected with the developer whom the plaintiffs alleged had conspired to defraud the plaintiffs by way of a scheme aimed at inducing the plaintiffs into purchasing apartments from the developer. H

[4] As against the financial institutions including the present defendants in this appeal, the plaintiffs alleged in paras 30 to 40 that in essence alleged the primary instrument that is the sale and purchase agreements entered into between the plaintiffs and the developer were void in law for having contravened the Power of Attorney Act 1949, the Local Government Act 1976 and the Companies Act 1965 and consequently the end financing agreements which the plaintiffs signed with the financial institutions would be void and of no effect. The declaration sought in this case against the I

financial institutions (the subject of this appeal) was to declare the financing agreements are null and void and accordingly the financial institutions should be estopped from enforcing the financing agreements.

[5] The grounds upon which the application to strike out are as follows:

(1) The borrowers cannot blow hot and cold by contending on the one hand that the financing agreements were valid when they required the purchase price to be paid from us and on the other to say that the agreement is void and invalid when it comes to their obligation to repay the borrowed funds.

(2) Essentially the plaintiffs' case as a borrower is a restitutionary relief sought against us and such a relief will not be granted unless the plaintiffs restore the benefit of the loan back to the bank.

(3) It should immediately be noted that the loan was granted by the bank at the behest of the plaintiffs themselves and had been fully disbursed to the developer as provided under the financing agreements. How could then the plaintiffs who requested us to finance their chosen investment can later be heard to say that they are absolved from repaying the loan. Consider also the timing in which the plaintiffs chose to raise the alleged illegality issues. It is raised not before the release of the loan but after the loan had been disbursed. See *Verschures Creameries Ltd v Hull and Netherlands Steamship Co Ltd* [1921] All ER Rep 215; at p 3 per Lord Justice Scrutton: 'A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage.'

(4) It is an indispensable rule of equity that where the plaintiffs are seeking an equitable restitutionary relief as in the present case where the plaintiffs are seeking a declaration that would rescind the financing agreements then he must first repay the loan to us the bank. See *Baranick v Counsel Trust Co* unreported, 4 January 1994 (General Division of the Ontario Court) where Rosenberg J held 'it is commonly said that it is a condition of the availability of such relief that it is possible to effect a restitutio in integrum of both parties — there must be a restoration of the status quo ante the injured party is not entitled to the equitable remedy of rescission He must be in a position to offer restitutio in integrum and must formally tender such restitution.' The principle in the *Baranick* case is that you cannot seek a declaration that the mortgage be set aside without being accountable for the return of the borrowed funds, without first making restitution of any funds that may have been paid up on the mortgage by the trust company.

(5) The illegality if any of the sale and purchase agreements does not taint the financing agreements. The fallacy of the plaintiffs' argument is in saying that the financing agreement is subsidiary to the sale and purchase agreement which they described as the primary instrument. That is wrong. The financing agreements are independent and separate contracts from the sale and purchase agreements both involving different parties. Under the sale and purchase agreement the plaintiffs have an obligation to pay the purchase price to the developer whereas under the financing agreement they have covenanted to repay to the defendants' bank the monies borrowed. Both are primary instrument on their own involving different parties. The relationship between the bank and the borrower is a contractual one. The bank did no more than to lend the money as requested. The plaintiffs rely on the authority of *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd* [1996] 2 MLJ 431. There the contract is between the lender and the developer. The developer there having executed various sale and purchase agreements then proceeded to execute a charge in favour of the lender. This was specifically prohibited by the Housing Developers Act 1966 and it was accordingly struck down on the ground that the contract was contrary to the statute and was void as against public policy because the Act was framed specifically for the protection of the purchasers. In our case it is the purchasers who requested the financiers to financially assist them in their investment with the developer.

(6) In conclusion a substantial part of the statement of claim paras 23 to 29 shows that the plaintiffs are unhappy with the commercial return of their investment. It is obvious that they want to be freed from their misfortune at the expense of the bank. They cannot unwind the state of affairs without first repaying the sums lent by the defendants in full.

(7) It is therefore submitted that the statement of claim discloses no cause of action and is plainly unsustainable.

SUBMISSION BY COUNSEL FOR THE PLAINTIFFS

[6] This is not a plain and obvious case for striking out. It must be borne in mind that the defendants have applied under limb (a) O 18 r 19 to strike out on the ground that there is no reasonable cause of action. The defendants are therefore confined to the four corners of the plaintiffs' pleading and as such references to the nature of the financing agreements are references which should not be admitted.

[7] In response to the specific contention of the defendants, the plaintiffs are not blowing hot and cold. They are contending that by reason of law the sale and purchase agreements are void and as such the end financing agreements secured by purported assignment of rights under the sale and purchase agreements are also void.

[8] The contravention of statute in issue does not only involve the question of illegality, they also raised the question of the power of the parties concerned into entering into the sale and purchase agreements. In this regard the plaintiffs firstly contend that the sale and purchase agreements and the adjunct guarantee return schemes were 'investment contracts' within the meaning of Part 4 Division 5 of the Companies Act 1965. If so only public companies are permitted in law to offer such contracts and even then such contracts are to be in approved deeds. See *NV Multi Corp Bhd & Ors v Suruhanjaya Syarikat Malaysia Kuala Lumpur* [2005] 6 MLJ 65.

[9] Consideration must be had to s 24(b) of the Contracts Act 1950 which provides for agreement that defeat law as being void. See *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356. The question of whether the transaction in issue here is void under s 24(b) is a mixed question of fact and law requiring a consideration of the evidence in totality. See *Lori Malaysia Bhd v Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997. The application here is made under O 18 r 19(1)(a) of the Rules of the High Court 1980 which does not allow for any consideration beyond the four corners of the plaintiffs' statement of claim. It is submitted that the plaintiffs have established a cause of action by their pleading and the fact that the claim may not necessarily succeed should not be held against the plaintiffs. See *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 1 CLJ (Rep) 211. Additionally the plaintiffs have sought declaration that identifies causes of action sufficiently. See *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565.

REPLY BY COUNSEL FOR THE 14TH, 17TH AND 18TH DEFENDANTS

[10] No purpose would be served by either counsel producing before the court a list of authorities on what constitutes plain and obvious cases. Each case must be determined on its peculiar facts. The test is this — it is not sufficient for the plaintiffs to merely say I have identified several issues which ought to be tried. The court must go on to further satisfy itself that there are issues that must be tried.

[11] The complaint about the sale and purchase agreements relates to separate and distinct contracts between the financiers and the plaintiffs of that case.

[12] It is not open to the plaintiffs to disown their investments at the expense of their financiers. The financiers after all granted the financing at their request and released the monies to the developer as their agent.

[13] In the *Baranick v Counsel Trust Co* Unreported, 4 January 1994 (Gen Div), the Canadian Court of Ontario held that it was not open for the purchasers to seek to set aside the mortgage security without first making restitution to the financiers. The court struck out the plaintiffs' action to declare the purchasers' mortgage with the bank the purchase Guildford Place condominium on account that certain requirement of the security commission for the sale of the condominium was not met by the vendors. This was what Justice Rosenberg said at p 10 of the unreported case as follows:

> The equitable remedy of rescission involves the setting aside of a transaction and the granting of such incidental relief as will restore the parties to their previous positions ... The remedy of rescission is an instrument of restitutionary relief in that it normally involves a restoration of the value of benefits conferred by each party ... Accordingly, the plaintiffs having been offered rescission when they have been offered it and failed to respond. Whatever may be the plaintiff's rights against the original promoter/vendor they are not entitled to rescission of the mortgages without repaying sums owing on the mortages.

[14] There is nothing illegal about the financing agreement which is simply to enable the plaintiffs to purchase service apartments. Neither is there anything illegal in the object of the sale and purchase agreement which is the purchase of service apartment. A careful reading of the illustration in s 24 will show that the law strikes down the section where the object is unlawful. There is nothing unlawful about the object of each of these two agreements that is to say the sale and purchase agreement entered into between the purchasers and the developer and the financing agreement between the purchaser and the bank.

[15] In form and in substance this is a pre-emptive action in that if this issue of law is not determined at this stage the bank would be bound hand and foot from claiming the monies lent until the action is tried many years later.

[16] Per Edgar Joseph Jr FCJ in *Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 at p 328: 'a commercial judge must be anxious about the impact that a decision may have on the proper functioning of the commercial community.' In this regard I say to hold that the plaintiffs can disown their chosen investment at the expense of the bank will strike terror to the banking community.

REPLY BY COUNSEL FOR THE PLAINTIFFS

[17] At the highest if the plaintiffs are correct then the bank would have financed illegal transaction. The law pertaining to local government bodies in

A the context of this case is not settled. Similarly the law relating to the application of Division 5 of the Companies Act 1965 is also not settled. To this end it is not right to assert that the object of the agreement between the developer and the purchasers was not illegal. That is an issue which cannot be determined summarily on the pleadings.

B

[18] There is no material before this court to show what was made available to the bank for the purpose of obtaining the loan. It is not possible to determine what the bank knew or what the bank did not know at this stage. The statement of claim sets the cause of action on the footing that the bank C at the very least was required in law to know of the application of Division 5 of the Companies Act 1965 to situations involving the sale of service apartments coupled with guarantee returns.

[19] The *Baranick*'s case has to be considered on its own facts. At p 8 of the D unreported decision para 36 it is apparent that the plaintiffs there were given an opportunity to rescind which they did not take up. That is not the case here. Further at para 51 at p 10 it is also stated that 'it is a condition of the availability of such relief that it is possible to effect a restitutio in integrum E of both parties'. The operative word is 'possible'. It is possible in this situation.

FINDINGS AND DECISION

F **[20]** The 14th, 17th and 18th defendants' (hereinafter referred to as the 'banks') joint application to strike out is made specifically under O 18 r 19(1) of the Rules of the High Court 1980 on the ground that the plaintiffs' pleading does not disclose a reasonable cause of action in so far as it involves the banks.

G

[21] In essence what the plaintiffs are seeking by this action first is to declare the sale and purchase agreements which they had individually entered into with the developer of the condominium void — by reason that the local authority Majlis Perbandaran Nilai ('the seventh defendant') the owner of the H land, on which the condominium was developed had contravened s 101(r) proviso (i) of the Local Government Act 1976 which requires the consent of the state authorities before the said Majlis Perbandaran Nilai can dispose of its property to the developer to be developed, and certain defects in the power of attorney granted by the Majlis to the developer to authorise the developer I to act on its behalf where necessary with respect to the development. The plaintiffs also contend that the sale of the apartments to the plaintiffs was in fact a sale under a guarantee return scheme which constitutes an 'investment contract' under para 4 of Division 5 of the Companies Act 1965 which the developer cannot in law undertake.

[22] The plaintiffs' cause of action against the banks (the subject matter of the present proceeding) however, is premised not on any impropriety on the part of the banks in granting the loan to the plaintiffs but on the assertion that the banks *were expected to know* of the alleged irregularities committed by Majlis Perbandaran Nilai and the developer, and consequently the banks should be estopped from exercising their right under the loan agreements.

[23] This is to be found in para 34 of the statement of claim which read as follows:

> 34. In view of the foregoing, the plaintiffs contend that the seventh defendant did not have the power in law to give the PA in favour of the first defendant under the Local Government Act 1976 and subsidiary legislation. Further or in the alternative, the PA was, in any event, insufficient in law. The first defendant as such did not as a matter of law have the capacity to enter into the SPAs. The SPAs are as such void.
>
> 34.1 The banks were expected in law to know this as a matter of law and as such, all end financing agreements are similarly void as instruments arising out of, or otherwise connected with, the SPAs.
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> 34.2 The banks were not in law empowered or authorised to act in any manner contrary to law. Providing end financing in these circumstances was a breach of banking laws and/or the licences under which the banks operated.
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> 34.3 The endorsing banks were further under a duty of care to the plaintiffs with regard entering into the end financing relationships they did. This duty was founded on the fact of the banks having endorsed the development and having entered the end financing relationships in the circumstances set out above. The endorsing banks breached their duty of care for not having appraised the plaintiffs of the fact that the seventh defendant had no legal right to act through the first defendant and in the circumstances, and in any event, by reason of it being unconscionable, are estopped from asserting their rights under the end financing agreements in connection with the foregoing.

[24] Having scrutinised the plaintiffs' pleading, I consider it unnecessary for me to undertake the onerous task of examining the cases submitted by counsel for the plaintiffs on the legality of the loan agreements that the plaintiffs had entered into with the banks assuming that the plaintiffs succeeded in their action to declare the sale and purchase agreements with the developer void. Rather, all that would be required is to apply common sense

against a set of well treaded and established procedural law relating to the striking out of pleadings which do not disclose a reasonable action.

[25] The following very basic principles gleaned from the 1988 Edition of the White Book which I consider relevant for the present purpose have been accepted and applied in our jurisdiction:

- A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered; per Lord Pearson in the English Court of Appeal case of *Drummond-Jackson v British Medical Association* [1970] 1 All ER 1094.
- So long as the statement of claim or the particulars disclose some cause of action, or raise some questions fit to be decided by a judge or jury, the mere fact that the case is weak, and not likely to succeed, is no ground for striking out (Court of Appeal in *Wenlock v Moloney* [1965] 2 All ER 871.)
- Where a cause of action discloses no cause of action only because a material averment has been omitted, the court while striking out the action will not dismiss the action but give the plaintiffs leave to amend, unless the court is satisfied that no amendment however ingenious, will cure the defect (*Republic of Peru v Peruvian Guano Co* (1887) 36 Ch D 489 at p 496.)

[26] Having considered the submissions of the parties, I find the plaintiffs' pleading seeking to prevent the banks from exercising their rights under the loan agreements plainly unsustainable.

[27] The relationship between the plaintiffs and the banks is purely commercial in nature strictly on a quid pro quo basis that the monies were lent to be repaid in accordance with the terms and conditions of the loan agreements.

[28] The contracts were therefore purely contracts to lend money using the apartments as security for the loan. The banks had nothing to do with the plaintiffs' purchase of the apartments. It was strictly a matter between the developer and the plaintiffs; and the banks as the provider of the loan, should not be concerned with the propriety or legality of any contracts entered into by Majlis Perbandaran Nilai, the developer, or any other persons leading to the acquisition and development of the land on which the apartments were built. As a matter of fact the banks would be as much a victim with respect to the apartments they had taken as a security if indeed they turned out to be not worth their value of the loan taken.

[29] The fact that the Majlis Perbandaran Nilai may have contravened the Local Government Act 1976 or the Power Attorney Act 1949 in granting the developer the power to act on its behalf, and that the sale of the apartments to the plaintiff may have been made in contravention of Division 5 of the Companies Act 1965 even if subsequently proved by the plaintiffs and accepted by the court at the trial, is totally irrelevant in so far as it involves the liability of the plaintiffs to the banks under the loan agreements that they have taken.

[30] It is clearly repugnant to good reason and common sense to find a cause of action based purely on the assertion that the banks were expected to know of those alleged irregularities and should therefore be estopped from enforcing their rights under the loan agreements. I would agree entirely with the submission of counsel for the banks that the consideration and object of the loan given by the banks to the plaintiffs were clearly not of such a nature that, if permitted, would defeat any law contrary to s 24(b) of the Contracts Act 1950.

[31] The case of *Chung Khiaw Bank* relied upon by counsel for the plaintiffs does not support the plaintiffs' right to maintain the action against the banks as it relates to some illegality being committed by a party in the contract to which the other was privy to.

Chung Khiaw Bank was a case of the bank having accepted the securities provided by Rasa Sayang Hotel to secure a loan which the bank provided to a director of a subsidiary company of the hotel to facilitate the purchase of the hotel's own shares. The activity contravened s 67 of the Companies Act 1967 which prohibits a company from giving financial assistance to purchase its shares. This is quite unlike the loan agreements between the plaintiffs and the banks which were concerned purely with providing the plaintiffs with the money to purchase the apartments and did not involve other parties.

[32] There is another reason why the plaintiffs' action against the banks is unsustainable. The sale and purchase of the apartments had been completed. The loan sums had been disbursed to pay for the purchase. No court would lend its hand in equity to a party to declare the other estopped from exercising his right under a loan agreement where it is plain and obvious that to do so would result in the former unjustly benefitting from not having to repay the loan. As alluded to by Rosenberg J of the Canadian High Court of Ontario in *Baranick*, such an order to bar the banks from exercising their rights under the loan agreements may only be obtained by the equitable remedy of recission of the loan agreements, that is to say an order to unmake

A the agreements and to restore the parties back to status quo ante in which case the plaintiffs would have to repay whatever sums expended by the banks to the plaintiffs.

[33] I am inclined to agree with the the submission of counsel for the B defendants that the plaintiffs' action against the banks is purely pre-emptive calculated to forestall any action by the banks to recover the loan from the plaintiffs at least for the period that the question of illegality concerning the development of the apartments remains unresolved. Needless to say, such an act is an abuse of the process of the court which may be prompted to act C under its inherent jurisdiction to strike out the plaintiffs' action against the banks. One need to be reminded of what Gopal Sri Ram JCA said in *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 4 MLJ 355 at p 359:

> Every court has inherent jurisdiction to prevent an abuse of its process. It is a D jurisdiction that is essential to ensure that the court's process is not used for a collateral purpose; that is to say for a purpose other than to obtain redress for a genuine grievance. This court has recognised that jurisdiction on more than one occasion. In *Malaysia Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425, this court observed as follows:
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> > Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the F defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.
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> The position has been neatly summed up by Lord Denning MR in his dissenting G judgment in *Goldsmith v Sperrings* [1977] 1 WLR 478, where at p 489 he said:
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> > In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused H when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer'.

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[34] It is plain and obvious that the plaintiffs do not have a cause of action against the 14th, 17th and 18th defendants. The deputy registrar was right in allowing their application to strike out the plaintiffs' pleading against them.

[35] The plaintiffs' appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by K Nesan